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*Admitted in Vermont and New Hampshire*

July 17, 2020

Ms. Barbara Neal, Executive Director  
Vermont Enhanced 9-1-1 Board  
100 State Street, 4th Floor  
Montpelier, VT 05620-6501

**Re: E911 Board Revised Draft Rule Governing Outage Reporting Requirements**

Dear Ms. Neal:

The eight Vermont rural local exchange carriers (“Vermont RLECs”)<sup>1</sup> write in response to your email request of July 9, 2020, for comments regarding the Revised Draft of the Outage Reporting Rule proposed by the Vermont Enhanced 911 Board (the “Board”).<sup>2</sup>

**1. Summary**

1. The Vermont RLECs object to the provision of the Board’s Revised Draft that would reduce the outage reporting threshold for wireline service providers, because S.301 (eff. July 1, 2020) by its plain terms requires the Board to adopt a new standard only for wireless service providers.

2. In addition, the Board’s Revised Draft relies, as its trigger for action, on a temporary, emergency rule adopted by the California Governor’s Office of Emergency Services that will expire when the present state of emergency in California expires. A temporary regulation of this nature is not a sufficient trigger for the Board’s permanent rulemaking authority under S.301.

**2. Background**

On January 31, 2020, the Board submitted a Final Proposed Rule to the Legislative Committee on Administrative Rules (“LCAR”). The Board’s new rule would establish new outage reporting thresholds for a variety of utility entities, including both wireline and wireless service providers. Specifically, the Final Proposed Rule would require wireline carriers, such as the Vermont

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<sup>1</sup> The eight Vermont RLECs are Franklin Telephone Company, Inc., Ludlow Telephone Company, Northfield Telephone Company, Perkinsville Telephone Company, Inc., Shoreham Telephone LLC d/b/a Otelco, Topsham Telephone Company, Inc., Vermont Telephone Company, Inc. d/b/a VTel, and Waitsfield-Fayston Telephone Co., Inc. d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom.

<sup>2</sup> The Vermont RLECs previously submitted comments to you regarding the Draft Outage Rule on August 16, 2019.

RLECs, to “report any known outage lasting more than 30 minutes that limits or prevents 25 or more subscribers from completing calls to, or communicating with, 911.” The Vermont RLECs have raised no objection to this requirement of the Final Proposed Rule.

The Board’s Final Proposed Rule is still pending before LCAR. In the meantime, however, the Vermont General Assembly has now enacted S. 301 (eff. July 1, 2020), which imposes the following requirement on the Board:

When one or more states with a combined population of 20,000,000 residents adopts a rule or enacts a law that applies a lower reporting threshold than is required under 47 C.F.R. Part 4, § 4.9(e)(1)(ii) as it pertains to wireless service providers, the E-911 Board shall initiate the rulemaking required under subsection (a) of this section and shall incorporate the lowest above-referenced reporting threshold applicable to wireless service providers into its proposed rule, which shall be filed with the Secretary of State pursuant to 3 V.S.A. § 838 not more than 60 days after the rulemaking has commenced. Subsequent reporting thresholds adopted or enacted outside Vermont shall not trigger a new rulemaking under this section.

S. 301 § 4 (emphasis added). The reference to the Code of Federal Regulations is to the section of the Federal Communications Commission’s rules governing reporting of 911-affecting outages for wireless service providers. See 47 C.F.R. § 4.9(e). By contrast, 47 C.F.R. § 4.9(f) governs reporting of 911-affecting outages by wireline service providers.

In response to S.301, the Board has proposed the Revised Rule, for which the Board now seeks comments. Under S.301, the Board’s rulemaking authority is triggered “[w]hen one or more states with a combined population of 20,000,000 residents adopts a rule or enacts a law that applies a lower reporting threshold than is required under [the FCC’s rule for wireless service providers].” In your email communication regarding the Revised Rule, you included a copy of Title 19, Division 2, Chapter 1.5 §§ 2480.1-2480.3 of Emergency Regulations adopted by the California Governor’s Office of Emergency Services, Public Safety Communications Division (the “California Emergency Rule”). The Board is relying on the California Emergency Rule as the triggering authority under S.301 for the Board’s revised rulemaking.

The California Emergency Rule reflects a policy change enacted by the California Legislature in October 2019, which required the Governor’s Office of Emergency Services to “adopt appropriate thresholds for determining whether a telecommunications service outage constitutes a community isolation outage based on the risks to public health and safety resulting from the outage.” Cal. Gov. Code § 53122(b)(1) (eff. Oct. 2, 2019). The California legislation required the Governor’s Office of Emergency Services to begin a formal rulemaking process with a final adoption deadline of July 1, 2020. However, with the onset of the COVID-19 pandemic, the Governor’s Office of Emergency Services adopted the Emergency Rule pursuant to the California Governor’s emergency orders, which temporarily suspended the requirements for

notice, hearing, and public comments for the adoption of administrative rules. The California Emergency Rule will therefore expire upon the expiration of California's present state of emergency,<sup>3</sup> at which time the Office of Emergency Services is expected to initiate a formal rulemaking proceeding, consistent with the requirements of Due Process, to adopt permanent rules to carry out the requirements of Cal. Gov. Code § 53122(b)(1).

Despite the California Emergency Rule's lack of formal rulemaking requirements, the Board's Revised Rule proposes to amend its Final Proposed Rule based on the lower reporting thresholds set in the California Emergency Rule. Under the Revised Rule, wireline carriers, such as the Vermont RLECs, would be required to report

any known [outage] that lasts at least 30 minutes and potentially limits or prevents (A) 100 or more subscribers in a single ZIP code or (B) at least 50% of subscribers in a ZIP code with fewer than 100 subscribers, from completing calls to, or communicating with, 911[.]

The foregoing standard would replace the standard from the Proposed Final Rule that would require wireline carriers to "report any known outage lasting more than 30 minutes that limits or prevents 25 or more subscribers from completing calls to, or communicating with, 911."

The Board apparently believes, and the Vermont RLECs concur, that the new standard, based on Zip Codes, establishes a lower reporting threshold for outage reporting than the Board's original standard from the Final Proposed Rule, which is based on a carrier's service area.

### **3. Argument**

#### **A. The Revised Rule Exceeds the Rulemaking Authority of S. 301 by Proposing New Thresholds for Wireline Carriers.**

The Vermont RLECs object to the Revised Rule insofar as it sets a lower outage reporting threshold for *wireline* carriers. By its plain terms, S. 301 instructs the Board, when the statutory requirements are met, to set lower outage reporting threshold for *wireless* carriers only.

S.301 expressly provides, in three places, that, when the Board's rulemaking authority is properly triggered, any new rule adopted by the Board is intended to apply only to wireless carriers:

- First, S.301 expressly states that the Board's rulemaking authority is triggered when a state with 20 million or more people adopts a rule or enacts a statute with a new reporting threshold that "pertains to wireless service providers."

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<sup>3</sup> The state of emergency in California is presently set to expire on or about September 4, 2020, but may be further extended, as it has twice previously.

- Second, the baseline standard referenced in S.301 is the FCC’s outage reporting standard for wireless carriers (47 C.F.R. § 4.9(e)).
- Third, S.301 expressly states that, when properly triggered, the Board’s rulemaking authority shall adopt new standards “applicable to wireless service providers.”

The Vermont General Assembly could not have been clearer in its instruction to the Board to establish a new reporting requirement for wireless carriers, upon the occurrence of a proper trigger. At the time S.301 was being debated and passed, the General Assembly was aware that the Board’s Final Proposed Rule, which had been filed with LCAR in late January, established separate reporting thresholds for wireline and wireless service providers. They were also aware that the FCC itself has established separate outage reporting standards for wireless providers (47 C.F.R. § 49(e)) and wireline providers (47 C.F.R. § 49(f)). Given these separate standards, the Vermont Legislature would not have mandated a single standard, applicable to both wireless and wireline providers, without stating so explicitly. The Vermont legislature knowingly limited the scope of its statutory requirements to adopting a new reporting standard for wireless carriers.

There is no basis in S.301 for the Board to revise the reporting standards for wireline carriers established in the Proposed Final Rule. The Board has nearly completed the requirements of the Vermont Administrative Procedure Act for adoption of the Final Proposed Rule, which would establish the reporting standards for wireline carriers. The Vermont RLECs have not objected to the standards for wireline carriers set in the Final Proposed Rule, and they respectfully ask the Board to adopt those standards, now pending before LCAR, without revision.

**B. The Revised Rule Relies on a Temporary, Emergency Rule from California that was not adopted in a manner consistent with due process.**

Under S. 301, the Board must initiate formal rulemaking “[w]hen one or more states with a combined population of 20,000,000 residents adopts a rule or enacts a law that applies a lower reporting threshold than is required under 47 C.F.R. Part 4, § 4.9(e)(1)(ii) as it pertains to wireless service providers.” S.301 § 4. In the present rulemaking, the Board relies on California’s adoption of the California Emergency Rule as the event that has triggered the Board’s Revised Rule. The California Emergency Rule was not adopted in accordance with customary due process protections involving notice, hearings and public comments and thus is not a sufficient triggering event under S.301.

The California Governor’s Office of Emergency Services in 2019 was authorized by statute to “adopt appropriate thresholds for determining whether a telecommunications service outage constitutes a community isolation outage based on the risks to public health and safety resulting from the outage.” Cal. Gov. Code § 53122(b)(1) (eff. Oct. 2, 2019). However, the formal rulemaking process for adopting those thresholds was interrupted by the present COVID-19 pandemic. The California Emergency Rule was then adopted on an emergency basis by

authority of the California Governor's declaration of a state of emergency, on March 4, 2020. That emergency declaration, which was initially in effect for 60 days, per Calif. Gov. Code § 8627.5(b), has since been extended for two additional 60-days periods and is now set to expire on September 4, 2020, unless it is further extended by order of the Governor. The California Emergency Rule will expire when the state of emergency expires.

The emergency declaration suspended the procedures customarily required for formal rulemaking under the California Administrative Procedures Act, Calif. Gov. Code, § 11340 *et seq.* (the "CA-APA"). Once the state of emergency ends, the Governor's Office of Emergency Services would be expected to initiate formal rulemaking to carry out the legislative mandate of Cal. Gov. Code § 53122(b)(1). Any regulations so adopted would be required to conform to the due process requirements of the CA-APA and would be influenced by written and oral comments from affected stakeholders and the public.

In S.301, the Vermont General Assembly expressed its intention that the Board initiate formal APA rulemaking when a state or combination of states with a total population of at least 20 million residents "adopts a rule or enacts a law that applies a lower reporting threshold than is required" by the FCC's standard for wireless carriers. There is no indication in the statute that the Vermont legislature intended the Board to use an emergency rule, which was not adopted pursuant to formal APA rulemaking, as the trigger for the Board to commence formal rulemaking under the APA. The General Assembly plainly had in mind that the Board should be able to rely on formal rules or duly enacted statutes from a state or states with larger populations than Vermont. If such states have already done the necessary work of taking and weighing public comment and testimony and fully vetting the substance of a 911 outage rule, then the Board would have a solid basis upon which to undertake its own rulemaking.

The California Emergency Rule does not meet the standard of a formal rule necessary to trigger the Board's rulemaking under S.301. Once the state of emergency in California has expired and the California Governor's Office of Emergency Services has adopted permanent rules, under the CA-APA, that fulfill the 2019 legislative mandate of Calif. Gov. code § 53122(b)(1), then those formal rules would be a proper triggering event under S.301.

#### **4. Conclusion**

The Vermont RLECs object to the Board's Revised Rule insofar as it imposes new outage reporting thresholds on wireline carriers. The Board has nearly completed the process for adoption of its Final Proposed Rule, to which the Vermont RLECs do not object. The recent enactment of S.301, which instructs the Board to adopt new outage reporting thresholds for wireless carriers upon the occurrence of a triggering event, does not provide a basis for the Board to revise the standards for wireline carriers established in the Final Proposed Rule.

The Vermont RLECs are also concerned that the California Emergency Rule, on which the Board is relying as the triggering event under S.301, was not adopted under customary due

process requirements of notice, hearings, and public comments, and does not meet the standards of a rule or law sufficient to trigger Board action under S.301.

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The Vermont RLECs thank the Board for the opportunity to offer the foregoing comments on the Board's Revised Rule. Please let me know if you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul Phillips", with a stylized flourish at the end.

Paul J. Phillips  
Counsel for the Vermont RLECs

cc: Vermont RLECs  
Patrick C. McHugh, Esq., Consolidated Communications  
Sarah Aceves, Esq., Vermont Department of Public Service